How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by **5pm on Friday 31 March 2017**.

Your submission may respond to any or all of these questions. We also encourage your input on any other relevant work. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please include your name, or the name of your organisation, and contact details. You can make your submission:

- By attaching your submission as a Microsoft Word attachment and sending to ***faareview@mbie.govt.nz***.
- By mailing your submission to:

  Financial Markets Policy
  Building, Resources and Markets
  Ministry of Business, Innovation & Employment
  PO Box 1473
  Wellington 6140
  New Zealand

Please direct any questions that you have in relation to the submissions process to: ***faareview@mbie.govt.nz***.

Use of information

The information provided in submissions will be used to inform the development of the Financial Services Legislation Amendment Bill, decisions in relation to the outstanding policy matters, and advice to Ministers.

We may contact submitters directly if we require clarification of any matters in submissions.

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Release of information

Submissions are also subject to the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

If your submission contains any confidential information, please indicate this on the front of the submission. Any confidential information should be clearly marked within the text. If you wish to provide a submission containing confidential information, please provide a separate version excluding the relevant information for publication on our website.

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Part 1 of the Bill amends the definitions in the FMC Act

1. If an offer is through a financial advice provider, should it be allowed to be made in the course of, or because of, an unsolicited meeting with a potential client? Why or why not?

   We believe that an offer should be allowed to be made in the course of, or because of, an unsolicited meeting with a potential client through a financial advice provider. A financial advice provider will be governed by the code of conduct and the conditions of their license to ensure an appropriate process is followed in promoting the offer whether the meeting is solicited or not. This ensures the client's interests are put first.

   In our experience many clients wish to complete their transaction on the first contact rather than have to set up another meeting. For example, we originally had in place a two part process where we would call our KiwiSaver clients to introduce ourselves and to send out information to the client before arranging another call to discuss options with them. Many clients were put off by this two stage process despite being prepared to have a discussion and take action. If advice could not be provided at the time of an unsolicited call, many investors would be inconvenienced at the least, and potentially miss out on receiving advice altogether at worst.

   It may also be challenging to distinguish whether advice can be given or not based solely on who initiated the contact. For example, if we call a client for any reason (e.g. to encourage an

MTC top up, inform the client of changes or simply to maintain regular contact), the discussion could easily turn to a matter that the client may want or need advice about. It would be practically difficult and somewhat nonsensical to allow advice if a client had phoned us, but not if we have an identical conversation with a client who we had proactively phoned.

2. If the exception allowing financial advice providers to use unsolicited meetings to make offers is retained, should there be further restrictions placed upon it? If so, what should they be?

We do not believe that further restrictions are necessary given the protections the client will receive due to the licensing process for financial advice providers.

Limiting the unsolicited meeting to existing clients would mean having to arrange separate appointments to talk to, for example, family members of the existing client who could benefit from the product and advice being offered. We commonly find that when discussing a product and providing advice to an existing client that they suggest we talk to a family member at that time.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?

We note that there has been some debate over the use of the term "financial adviser representative" (FAR). We support the use of this term as it immediately clarifies the service that the representative is providing – i.e. the provision of advice. It also ensures that clients understand that the person they are dealing with is authorised and has the required competencies to provide them with financial advice (which is linked to the scope of service the client has agreed to).

We do not support the use of terms such as "agent" or "salesperson" or any other term that excludes the word "advice". The terms "agent" and "salesperson" can have negative connotations for clients which could make it more difficult to deliver the advice to them in the first instance, and could also undermine any advice ultimately given.

In practice, a FAR will always precede their title with the name of the organisation they represent, and we believe in conjunction with the disclosures that will be given it will be very clear to clients the type of advice they will receive when dealing with a FAR. The distinction between a FAR and a Financial Adviser (FA) is less important when compared to the current regime as the client's rights and standards of advice in the new regime will be the same irrespective of whether the advice is provided by a FAR or FA.

Where an FA's offering is materially different to the advice given by a FAR, again this will be made obvious by the disclosures and discussions they have with their clients. We believe it is in the interests of the industry, and the intention to give clients better access to advice, that the FA "brand" is developed further so that people understand what that stands for rather than dilute the brand of a FAR by removing the word advice from the designation.

Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?

We support the introduction of a licensing regime to regulate the provision of financial advice. We believe that the provision of financial advice should be established as a profession with high standards. We agree that while standards should be high, providing accessibility to good quality

advice is extremely important. The introduction of the licensing regime should not set barriers in terms of the standards that need to be met in the provision of advice so that access to that good quality advice becomes limited.

The issue of limited access to advice has been more problematic for investors than instances of poor quality advice. We are of the opinion that this is the intention of the bill and feel that with a small number of exceptions this intent will be achieved with the current drafting of the bill.

Part 3 of the Bill sets out additional regulation of financial advice

5. Do you agree that the duty to put the client's interest first should apply both in giving the advice and doing anything in relation to the giving of advice? Does this make it clear that the duty does not only apply in the moment of giving advice?

   We agree with the intention of managing conflicts of interest by putting the client's interests ahead of the advisers. We do however have some concerns with the vagueness of putting the client's interests first ahead of all other people, at all times, as the bill currently requires.

   Advisers should be required to put client's interests first in the area they're advising on, and not necessarily the client's overall situation. For example, a KiwiSaver discussion should not involve a consideration to pay off your mortgage if advice on KiwiSaver alone is the agreed scope of service.

   We believe that there needs to be a more prescribed approach in determining when the client's interests should come first, and we believe this will be better achieved in the code of conduct. The code can go into more detail than the act, and can be more easily amended over time as the concepts are bedded in.

6. Do you have any comments on the proposed wording of the duty that a provider must not give a representative any kind of inappropriate payment or incentive? What impacts (both positive and negative) could this duty have?

   We feel that the phrase "inappropriate payment or other incentive", and particularly the definition of inappropriate itself, is too wide and subjective to be included in the act. Taken to the extreme, no adviser would give any advice without an incentive of some kind, and therefore any misconduct could be said to have been induced by the incentive. In addition, the same incentive could encourage different individuals differently. While we are opposed to exclusively target/volume based commissions, we are supportive of incentives that integrate quality measures based on advice and service offered together with some targets.

   We also appreciate that it is not possible to fully define all of the potential incentives, however as with the duty to put client's interests first, we feel that this could be dealt with in the code of conduct with the bill being amended so that it is less open to interpretation.

7. Do you support extending the client-first duty to providers who do not provide a retail service (i.e. those who only advise wholesale clients)? Why or why not?

We do not support this concept. While we believe that aligning the definition of a wholesale investor with the definition already in existence in the FMCA is logical and helps to ensure that wealthy but unsophisticated investors are protected, we do not believe that a wholesale client requires the same standard of care as a retail client

"True" wholesale clients understand the industry and do not require the same level of protection and disclosure as retail clients (especially if we assume that the threshold for a wholesale client will be raised). The terms between a wholesale client (e.g. an institutional investor) and a provider are captured in its own agreement and negotiated between the two parties. Both parties are on an equal footing in these situations and a 'client-first' duty on providers could have adverse consequences in the negotiations. It is not practical for any business to negotiate a deal where they are legally required to put the interests of the other party ahead of theirs.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?

Part 4 of the Bill sets out brokers' disclosure and conduct obligations

9. What would be the implications of removing the 'offering' concept from the definition of a broker?
   We are not opposed to this suggestion provided it does not impact on outsourced arrangements.

10. Do you have any other feedback on the drafting of Part 4 of the Bill, for example any suggestions on how the drafting of broker provisions could be simplified or clarified?
    Enter text here.

Part 5 of the Bill makes miscellaneous amendments to the FMC Act

11. Should financial advisers have direct civil liability for breaches of their obligations, if the financial advice provider has met its obligations to support its advisers? Why or why not?

12. Should the regime allow financial advice providers to run a defence that they met their obligations to have in place processes, and provide resources to enable their advisers to comply with their duties?
    We agree that a FAP should have a duty to have in place controls on the advice given by its FARs, however even the most robust processes and controls are capable of being circumvented where the individual is either determined to do so or is grossly negligent. Where this is the case we believe that the FAP should be able to rely on having in place reasonable processes and controls as a defence, and the FAR should face direct consequences (the FAP is likely to experience brand and reputational damage in such a case anyway). Meeting the requirement to provide ready access to advice could be made difficult if the risks of providing such advice become too onerous on licensed providers – the fines are significant and reasonable defences should be available to providers.

13. Is the designation power for what constitutes financial advice appropriate? Are there any additional/different procedural requirements you would suggest for the exercise of this power?
    Enter text here.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?
    We believe that in most cases it should be clear where an institution is providing a retail service and as such application of the distinction should be workable in practice.

15. Do you have any other feedback on the drafting of Part 5 of the Bill?
    Enter text here.

Part 6 of the Bill amends the FSP Act

16. Does the proposed territorial application of the Act set out above help address misuse of the FSPR? Are there any unintended consequences? How soon after the passing of the Bill should the new territorial application take effect?
    Yes, immediately.

17. Do you support requiring further information (such as a provider's AML/CFT supervisor) to be contained on the FSPR to help address misuse?
    We do not support requiring further information such as the provider's AML/CFT supervisor to be included on the FSPR. We believe the information that a prospective client will place the most weight on and be the determining factor is whether or not the provider is licensed. Knowing who their AML/CFT supervisor is will mean little to a client who likely would not have been aware the provider required such a supervisor in the first place.

18. Do you consider that other measures are required to promote access to redress against registered providers?
    Clients should have redress via a dispute resolution service (DRS) regardless of whether the provider is based in New Zealand or not. To the extent that a provider must engage with a DRS to be licensed and listed on the FSPR, if a DRS can terminate membership (and this in turn triggers deregistration from the FSPR) this is a very strong incentive for the provider to engage in a reasonable manner and ensure clients have access to redress.

19. Do you have any comments on the proposed categories of financial services? If you're a financial service provider, is it clear to you which categories you should register in under the proposed list?
    Enter text here.

20. Do you support clarifying that schemes must provide information to the FMA if they believe that a provider may be involved in conduct that constitutes breach of relevant financial markets legislation?
    We support this proposition as it acts in the best interests of the industry. Given the complaint must be material in the first instance before it is reported, it is reasonable that the scheme

should not have to wait for a similar complaint to occur to inform the regulator if the complaint points to a breach of the legislation.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?
    Enter text here.

Schedule 1 of the Bill sets out transitional provisions relating to DIMS and the code of conduct

22. When should an FMC Act DIMS licence granted to AFAs who provide personalised DIMS expire? For example, should it expire on the date on which the AFA's current authorisation to provide DIMS expires?
    Enter text here.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
    Enter text here.

Schedule 2 of the Bill creates a new schedule to the FMC Act with detail about the regulation of financial advice

24. Should the FMC Act definition of 'wholesale' be adopted as the definition of wholesale client for the purposes of financial advice? Why or why not?
    We agree that the definition of wholesale in the FMC Act be adopted for the purposes of financial advice. A client with net assets of $1 million is not uncommon, and is not necessarily investment savvy. They should have ready access to the protections afforded a retail client and raising the threshold to $5 million will set a more realistic expectation.

25. We understand that some lenders consider that they may be subject to the financial adviser regime because their interactions with customers during execution-only transactions could be seen to include financial advice. Does the proposed clarification in relation to execution-only services help to address this issue?
    Enter text here.

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
    Enter text here.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
    Enter text here.

28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?
    Enter text here.

29. Does the wording of the required minimum standards of competence knowledge and skill which 'apply in respect of different types of advice, financial advice products or other circumstances' adequately capture the circumstances in which additional and

different standards may be required?
Enter text here.

30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?
We do not think that the FADC is the appropriate place to consider complaints against financial advice providers. Complaints are more appropriately directed towards the DRS and then FMA itself if unresolved. Financial advice providers are likely to have their own disciplinary processes in place for one-off individual advice case complaints and if the complaint appears more systemic then it would be appropriate for FMA to be directly involved as it may require deep resources to investigate matters that could represent a threat to the overall health of the industry. It would be inappropriate to expect FADC to deal with such matters directly.

31. If the jurisdiction of the Financial Advisers Disciplinary Committee is extended to cover financial advice providers, what should be the maximum fine it can impose on financial advice providers?
See above.

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
Enter text here.

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
Enter text here.

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
We support a staged transition. It gives providers time to amend their processes and upskill while still operating their businesses. The majority of participants do not have resource available that can be solely dedicated to obtaining a license and implementing the conditions required by the license.

    We do have some concerns over the two February dates proposed. It is difficult to gain approvals in December and January, and systems freezes and staff absences can also make implementation difficult during that period. Extending to April in both 2019 and 2021 would be beneficial.

35. Is six months from the approval of the Code of Conduct sufficient time to enable existing industry participants to shift to a transitional licence?
Generally speaking, yes. However any changes that may require significant development work prior to implementation would need to be widely communicated prior to approval as they could require more than 6 months to implement.

36. Do you perceive any issues or risks with the safe harbour proposal?
Enter text here.

37. Do you think there are any elements of the new regime that should or shouldn't take effect with transitional licences? What are these and why?
    Enter text here.

38. Is two and a half years from approval of the Code of Conduct sufficient time to enable industry participants to become fully licensed and to meet any new competency standards?
    Enter text here.

Possible complementary options

39. Do you support the option of AFAs being exempt from complying with the competence, knowledge and skill standards for a limited period of time? Why or why not?
    Enter text here.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    Enter text here.

41. Is there a risk that this exemption could create confusion amongst industry and for consumers about what standards of competence, knowledge and skill are required?
    Enter text here.

42. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?
    Enter text here.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    Enter text here.

44. Is it appropriate for the competency assessment process to be limited to existing AFAs and RFAs with 10 or more years' experience? If not, what do you suggest?
    Enter text here.

45. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?
    Enter text here.

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
    Enter text here.

47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
    Enter text here.

48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?

Enter text here.

Demographics

49. Name:
    Fisher Funds Management Limited

1. Contact details:
   Doug Booth
   REDACTED

2. Are you providing this submission:
   ☐On behalf of an organisation

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☐I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons for this for consideration by MBIE.

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